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UNCLAS SECTION 01 OF 02 THE HAGUE 000290

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DEPARTMENT FOR L - TAFT/SCHWARTZ, L/UNA -
MATHIAS/LAMOTTE/COGAN

E.O. 12958: N/A

TAGS: [AFIN](#) [AORC](#) [ICJ](#)

SUBJECT: ICJ: 48 STATEMENTS FILED IN FENCE PROCEEDING

REF: A. WWW.ICJ-CIJ.ORG/ICJWWW/IDOCKET/IMWP/IMWPPFRAME .HTM

[B](#). THE HAGUE 251

[C](#). PARIS 690

[1](#)1. (SBU) Summary: The International Court of Justice (ICJ) received forty-eight written statements by its deadline of January 30 in the advisory opinion proceedings concerning "the legal consequences of the construction of a wall in the occupied Palestinian territory" (the Fence Case). While the statements varied in their attention to the legality of the fence, the forty-four states were almost evenly divided between those which argued that the Court should not provide an opinion in the case and those that argued that the Court should find the Fence to be illegal under international law. While the names of all of the submitting parties -- forty-four states, the United Nations, Palestine, the Arab League, and the Organization of the Islamic Conference (OIC) -- may be found at the ICJ website (ref a), it is the Court's intention that the written statements themselves remain confidential at least until February 23, the date on which

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the hearings in the case are scheduled to commence. The UN submitted what it described as a factual statement but advised that it will not participate in the oral hearings. The Court also rejected (13-1) Israel's challenge to the participation in the case of Egyptian Judge Nabil Elaraby. End summary.

[1](#)2. (SBU) On Tuesday, February 3, the ICJ Registry distributed to all UN Member States represented in The Hague copies of the statements submitted in the Fence Case (full set sent by DHL to L/UNA). Among the submissions, there are several of note:

-- The UN submitted "factual information" in order "to supplement" the Secretary General's report of November 24, 2003 (A/ES-10/248). At the same time, a cover letter from the SYG informed the Court "that the United Nations will not present oral statements and comments to the Court during the hearings" of the case.

-- Palestine submitted a three volume statement consisting of an approximately 300 page written statement, an annex of several maps and photographs of the fence, and fourteen documentary annexes. It asks the Court to find, among other things, that Israel is an occupying power under the Fourth Geneva Convention; that Israel "has no right to construct and operate the Wall"; that the fence violates international humanitarian and human rights law; that its construction involves unlawful confiscation of property; and that it is discriminatory. Describing Israel's actions as "grave breaches" of international law, it further asks the Court to find the fence violates Palestinian rights of self-determination and that Israel is bound to cease construction of and dismantle the fence, compensate for damage and injury, and "heed the will of the international community." Palestine also argues that other States are obliged to cooperate so as to bring an end to the fence.

-- Many of the statements are strongly supportive of the Palestinian submission and argue that the Court should find the fence to be illegal under international law. These include Egypt, Jordan, the Arab League, the OIC, Saudi Arabia, Syria, North Korea (which likens the fence to the North-South demarcation line on the Korean peninsula), Cuba, Malaysia, Pakistan, South Africa, Indonesia, Morocco, Yemen, Lebanon. Several others submitted short (one or two page) submissions reaffirming views they expressed during UN General Assembly (UNGA) debates in support of the Palestinian position.

-- Israel submitted two volumes consisting of an approximately 120 page written statement and a documentary annex. Its argument focuses on the propriety of the ICJ addressing the request submitted by the UNGA. The submission focuses on issues relating to what it sees as the "fairness" of the proceedings as well as the jurisprudence of the Court, which, it says, should lead the Court to find either that it lacks jurisdiction over the request or that it must decline to answer the request on grounds of propriety.

-- While no other state defends the legality of the fence, several submitted statements arguing that the Court should decline to issue an opinion for reasons of propriety (though some added that, in their view, the fence is counterproductive or illegal). These include, in addition to the USG (ref b), the United Kingdom, Australia, Canada, the Czech Republic, France (see below), Spain, the Netherlands, Greece, Norway, Japan, Germany, Italy, Micronesia, Marshall Islands and Palau.

-- As expected (ref c), France filed a statement providing its views on the illegality of the fence. At the same time, it associates with the position of the European Union, which Ireland, as President of the EU, explained to the Court as follows: "the EU believes that the proposed request for an Advisory Opinion . . . is inappropriate. It will not help the efforts of the two parties to relaunch a political dialogue."

-- Russia submitted a statement which essentially quotes its own statement made during the UNGA vote on the advisory opinion, adding its belief "that any response of the Court to the General Assembly's request, whether or not it decides to give an advisory opinion, should not hamper or create additional obstacles for (a) negotiating process or make the two-State solution impossible."

-- Switzerland submitted a statement in which it found no decisive reason for the Court to refuse to issue an opinion in the case and focused on the applicability of instruments of international human rights and humanitarian law in the territories.

13. (SBU) On January 30, the Court also rejected in a 13 to 1 decision an Israeli request that Egyptian Judge Elaraby not participate in the case due to his previous involvement in similar issues while posted to the Egyptian Mission to the UN in New York. The Court found that Israel's request did not point to any instance of Judge Elaraby having expressed a view on the questions posed to the Court in this case. As a result, it found no basis "to preclude Judge Elaraby from participating in the present case." Judge Buergenthal (American) dissented.
SOBEL